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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOHNNY RINGGOLD, Defendant and Appellant.	B208156 (Los Angeles County Super. Ct. No. BA330994)

APPEAL from a judgment of the Superior Court of Los Angeles County, Patricia J. Titus, Judge. Reversed and remanded with directions.

Gary V. Crooks, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey, Julie A. Harris and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Johnny S. Ringgold appeals from the judgment entered following his plea of no contest to possessing methamphetamine (Health & Saf. Code, 11377, subd. (a)), following the denial of his suppression motion (Pen. Code, § 1538.5). The court sentenced appellant to prison for 16 months. We reverse the judgment and remand with directions.

FACTUAL SUMMARY

The record (the preliminary hearing transcript) reflects that prior to October 24, 2007, undercover Los Angeles Police Officer Arturo Koenig communicated by email with German Kroytor[1] about Kroytor supplying methamphetamine to Koenig. Kroytor agreed to come to a parking lot on Eagle Rock Boulevard.

Instead, on October 24, 2007, Koenig had Los Angeles Police Officer Gasca and other officers go to the parking lot. Gasca recovered methamphetamine from Kroytor. Kroytor admitted to Gasca that Kroytor had just purchased the methamphetamine at the Olive Motel at 2751 Sunset Boulevard. Koenig testified "[h]e said it was in room 26 and from a female named Sarah."

Gasca later went to the above motel and saw appellant and a woman exit room No. 26. Gasca recovered from appellant a white bag containing a black pouch, inside of which was a Ziploc baggy. The baggy contained, inter alia, methamphetamine. Gasca also recovered from appellant two Ziploc baggies from appellant's left pants pocket. The parties stipulated appellant possessed .22 grams net weight of methamphetamine plus a baggy containing .19 grams net weight of methamphetamine.

CONTENTION

Appellant claims the trial court erroneously denied his Penal Code section 1538.5 suppression motion.

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[1] Kroytor was a codefendant. He is not a party to this appeal.

DISCUSSION

The Trial Court Reversibly Erred by Denying Appellant's Suppression Motion.

1. *Pertinent Facts.*

a. *Suppression Hearing Evidence.*

Viewed in accordance with the usual rules on appeal (*People v. Leyba* (1981) 29 Cal.3d 591, 596-597), the evidence established that about 8:00 p.m. on October 24, 2007, Los Angeles Police Officer Luis Gasca was assigned to the northeast division narcotics enforcement detail. Gasca testified as follows. At the above date and time, Gasca was at 2751 Sunset Boulevard when he contacted appellant outside a motel. Gasca walked up to appellant and asked appellant his name and information. Specifically, Gasca asked appellant what his name was and if he was on probation or parole.

Appellant provided his name to Gasca and told Gasca that appellant was on formal probation. About two or three minutes passed from the time Gasca contacted appellant to the time appellant said he was on formal probation. Gasca also testified that after appellant told Gasca that appellant was on formal probation, Gasca interviewed him and obtained appellant's name and birth date.

About two or three minutes after Gasca obtained appellant's name and birth date, a marked black-and-white patrol car arrived. Gasca also testified the patrol car arrived "two to three minutes from the initial contact" with appellant. When the patrol car arrived, Gasca gave the officers in it appellant's name and birth date "to run him via the MDT for wants and warrants."

The following then occurred: "Q Did they immediately do that at your request? [¶] A Yes, they did. When they obtained - - we had three individuals outside. They obtained all the information, I think. We handed him over to the officers who went to the black-and-white. [¶] Q Did they then immediately run [appellant] for wants and warrants? [¶] A Yes." (*Sic*.) Gasca also testified that he personally provided the officers with "the information." When the officers ran appellant via the MDT system at Gasca's instruction, Gasca was on the sidewalk between appellant and the marked patrol

car. Gasca stood with "[appellant] waiting to obtain the information" that Gasca had requested.

At some point, one of the officers in the patrol car notified Gasca about the information he had requested. Gasca testified that one of the officers notified Gasca that appellant had an outstanding felony warrant "if not actually multiple arrest warrants[.]" Perhaps five or 10 minutes passed from the time Gasca initially stopped to talk to appellant to the time the officer told Gasca that appellant had an outstanding arrest warrant. Gasca did not handcuff appellant before Gasca found out that appellant had an arrest warrant.

After Gasca found out that appellant had an arrest warrant, Gasca handcuffed and arrested him. After Gasca arrested appellant, Gasca went into appellant's pockets.[2] Gasca did not search appellant before Gasca knew appellant was on formal probation and had an arrest warrant. For reasons discussed below, appellant presented no defense evidence.

b. *Appellant's Suppression Motion and the Court's Ruling.*

On December 20, 2007, appellant filed a Penal Code section 1538.5 suppression motion. In the written motion, appellant sought suppression of his statements and other evidence. Appellant sought suppression on the grounds, inter alia, his initial detention was unlawful because it was not based on reasonable suspicion, police conducted an unlawful patdown search of appellant, his detention was illegally prolonged, his consent to search was invalid, and police illegally seized property without probable cause to believe the property was related to a crime.

At the February 6, 2008 hearing on appellant's suppression motion, Gasca testified as previously indicated. After Gasca so testified, the prosecutor commented that appellant lacked standing to make the suppression motion. The prosecutor then stated,

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[2] The following occurred: "Q . . . [p]rior to finding out he was on formal probation and prior to finding out that he had an arrest warrant outstanding, did you ever handcuff him? [¶] A No. [¶] Q Did you go inside any pockets or search him? [¶] A No, not inside his pockets."

"[appellant] was on formal probation with search and seizure conditions which I would ask the court to take judicial notice of, and he had an outstanding arrest warrant at the time which means that he was placed under arrest based on that warrant; therefore, he does not have standing for this search and seizure motion."

The court indicated it wanted to hear from appellant. Appellant's counsel stated, "based on the information that I have, the testimony given by Officer Gasca is contrary to the information that I have based on the police report, and I'd ask that we be given some leeway to present some evidence as to what actually occurred on that day with respect to the detention and Officer Codas, who will be testifying. I am asking calling Officer Codas for what he understood the events of that date to be as well as the civilian witness who was also present on that date. So there is a factual issue here as to what occurred." (*Sic*.)

The following then occurred: "The Court: If he is on formal probation with search and seizure conditions, what difference does it make? [¶] [Appellant's Counsel]: Well, case law dictates that that does not come into play unless the officer knew prior to searching him he was on formal probation and had search and seizure conditions. [¶] The Court: Okay. So that is what the testimony is. They asked him, he told him that he was on formal probation."

The prosecutor then stated, "I would point out the second issue, he had multiple outstanding arrest warrants in the system, so any search was incident to arrest and there was an actual warrant in the system. He has a warrant, so I still think he has standing [*sic*]. I don't think there is any way to get to standing in this case, to be quite frank."

Appellant's counsel later stated, ". . . I still believe there is a factual issue here, . . . I believe that the witnesses will testify that the officer did not know about the warrant. They did not run [appellant] until he got to the station."

The trial court stated, "Even still he had an arrest warrant in the system. I don't know if you can overcome that regardless of the different factual scenarios that occurred. The main fact is he had contact with the police. They ran him. There is a valid warrant

in the system, so they had a right to arrest him and then to search him incident to that arrest. So on that basis I am going to deny the motion to suppress."

2. *Analysis.*

a. *The Trial Court Erroneously Precluded Appellant from Cross-Examining Gasca and from Presenting Appellant's Testimony.*

Appellant claims the trial court erroneously denied his Penal Code section 1538.5 suppression motion. We agree. Appellant's argument raises a number of Fourth Amendment issues, including (1) whether appellant was detained,[3] (2) whether appellant's initial detention was lawful as reasonable,[4] and (3) whether the search of appellant was lawful as incident to his arrest since he had an outstanding arrest warrant.

However, for the reasons discussed below, the fundamental problem with this case is that the trial court erroneously precluded appellant from cross-examining Gasca, the People's sole witness at the hearing on the suppression motion, and erroneously precluded appellant from presenting defense evidence on the above (or any other) issues.

In *People v. Clower* (1993) 16 Cal.App.4th 1737 (*Clower*), a defendant charged with a narcotics offense brought a Penal Code section 1538.5 motion to suppress

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[3] A person is detained, and therefore "seized" within the meaning of the Fourth Amendment, only when the person is physically restrained or voluntarily submits to a peace officer's show of authority. (*People v. Johnson* (1991) 231 Cal.App.3d 1, 10-11; *People v. Arangure* (1991) 230 Cal.App.3d 1302, 1307.) The requisite show of authority exists when a reasonable person would believe that the person was not free to leave. (*People v. Johnson, supra,* at pp. 10-11; *People v. Arangure, supra,* at pp. 1305-1308.) Appellant apparently raises the issue of whether he was detained. For example, after distinguishing between contacts, detentions, arrests, he asserts in his brief, "The hallmark of a consensual encounter is that the person being under no compulsion to respond or remain, believes he is free to leave. [Citation.] Manifestly, the initial contact between Officer Gasca and appellant was not a consensual encounter since he was patted down before he was even asked his name and apparently was never free to leave."

[4] "A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231.)

evidence discovered during a February 5, 1992 parole search of the defendant. (*Clower, supra,* at p. 1739.) After the presentation of the People's evidence, the defendant sought to testify he previously had been the subject of repeated unfruitful warrantless searches by the same police narcotics task force based on confidential informant information. The defendant proffered his testimony to show, inter alia, that the parole search was unlawful because (1) police conducted it to harass the defendant, and (2) it was not based on the requisite reasonable suspicion that the defendant was involved in criminal activity. (*Id*. at pp. 1740-1742.) The trial court excluded the defendant's testimony and denied the suppression motion, and the defendant pled guilty. (*Id.* at pp. 1739-1740.)

On appeal, the defendant claimed the trial court erred by excluding his testimony. (*Clower*, *supra,* 16 Cal.App.4th at p. 1741.) *Clower* concluded appellant's proffered testimony was relevant on the harassment and reasonable suspicion issues. (*Id.* at p. 1742.) *Clower* then stated, "[b]ecause appellant was not permitted to testify regarding the circumstances of the earlier searches--who conducted them, under what circumstances, whether the same confidential informant who supplied the information which led to the February 5th search supplied information which instigated those searches, etc.--there was no evidence with which the court could evaluate his claims that the confidential informant was in fact unreliable or that the February 5th search was part of a pattern of harassment. *In other words, appellant was precluded from fully litigating the legality of the search* on February 5.

"The trial court commented that, even if appellant's proffered testimony was true, it would still deny the suppression motion. However, since the record does not disclose how appellant's testimony would have impacted the reasonable suspicion or harassment issues, we cannot determine with any degree of certainty what result the trial court would have reached had it considered appellant's testimony. [Citation.] Accordingly, we cannot conclude there is no reasonable probability that a result more favorable to appellant would have been reached in the absence of the error. [Citation.] Therefore, the judgment must be reversed." (*Clower*, *supra,* 16 Cal.App.4th at pp. 1742-1743, italics added.)

In *People v. Cervantes* (2002) 103 Cal.App.4th 1404 (*Cervantes*), the defendant was driving a car which police stopped for a traffic light violation. During his subsequent detention, police learned that the defendant and his car were subject to a probation search condition. Police searched the car pursuant to the condition. (*Id.* at p. 1406.) The defendant proffered testimony from witnesses that no traffic violation occurred and contrary testimony by police was false; therefore, the traffic stop, detention, and search were illegal as arbitrary, capricious, and harassing, notwithstanding the probation search condition. (*Id.* at pp. 1406-1407.) The defendant argued the trial court erred by not permitting appellant to prove the illegality of the stop. (*Id.* at p. 1407.)

Cervantes stated, "It is only when the motivation for the search is wholly arbitrary, when it is based merely on a whim or caprice or when there is no reasonable claim of a legitimate law enforcement purpose, e.g., an officer decides on a whim to stop the next red car he or she sees, that a search based on a probation search condition is unlawful. [¶] The offer of proof here that appellant made the turn signal the officers accused him of omitting is arguably such a case. *The trial court should have heard the evidence* and decided first if the officers stopped appellant for a traffic violation. If it concluded they did not, it should have reached the issue as to whether their action was arbitrary, capricious or harassing. [¶] The judgment is reversed; the trial court is directed to conduct a second section 1538.5 hearing." (*Cervantes*, *supra*, 103 Cal.App.4th at p. 1408, italics added.)

In the present case, appellant stated he wished to present evidence as to two "factual issue[s]." The first factual issue, through the testimony of an Officer Codas, pertained to appellant's detention and, through the testimony of Codas and a civilian, pertained to "the events of that date." The second factual issue pertained to whether police were aware of appellant's outstanding warrant at the time police searched him.

There is no dispute that evidence pertaining to appellant's detention was relevant. As for the relevance of evidence on the issue of whether police were aware of appellant's outstanding warrant prior to searching him, we note the following.

Police may conduct a lawful warrantless search of a person incident to the person's arrest. (*People v. Coleman* (1991) 229 Cal.App.3d 321, 325.) Moreover, the fact that the defendant is not formally arrested until after the search does not invalidate the search if probable cause to arrest existed prior to the search, and the search is substantially contemporaneous with the arrest. (*People v. Adams* (1985) 175 Cal.App.3d 855, 860-861.) Probable cause to arrest exists if *facts known* to the arresting officer would lead a person of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that an individual is guilty of a crime. (*People v. Kraft* (2000) 23 Cal.4th 978, 1037.)

Simply put, if, in the present case, Gasca knew about appellant's outstanding warrant(s) before Gasca searched appellant, the search was lawful as incident to appellant's arrest and, if Gasca was unaware of the warrant(s), the search could not be justified as incident to appellant's arrest because, based on the facts in this case, Gasca would have lacked *probable cause* to arrest appellant. Moreover, notwithstanding the trial court's suggestion to the contrary, the mere fact that appellant had a valid warrant in the system did not give Gasca the right to arrest appellant *based on probable cause to arrest* and then search him *as incident to that arrest* if Gasca was unaware of the warrant.

The reasonableness of a search is determined based on the circumstances known to the officer when the search is conducted. (*People v. Brendlin* (2008) 45 Cal.4th 262, 273.) Since Gasca's search of appellant as incident to an arrest *based on probable cause to arrest* was lawful only if "facts known" (*People v. Kraft, supra,* 23 Cal.4th at p. 1037) to Gasca would lead a person of ordinary care to have the requisite strong suspicion, i.e., as pertinent here, only if Gasca was aware of the warrant, appellant's proffered testimony that Gasca was unaware of the warrant until after he searched appellant was relevant.

The trial court in the present case stated that police contacted appellant (not that police detained him). The court stated police ran appellant, but the court did not expressly state whether appellant's detention during that period was prolonged, unduly or otherwise. Moreover, the court, as discussed above, erroneously stated that the mere fact

that appellant had a valid warrant gave police the right to arrest him and search him incident to his arrest.

Further, on the basis of the above statements, the trial court denied the suppression motion, and did so without giving appellant an opportunity to testify on the issues of, e.g., whether he was detained, whether any initial detention was lawful, whether his later detention was unduly prolonged, and whether he was lawfully searched incident to his arrest based on the outstanding warrant. Indeed, the facts in this case are more favorable to appellant than those in *Clower* and *Cervantes* since here, unlike in those cases, it is clear appellant was not even permitted to cross-examine the People's sole witness at the suppression hearing on the above Fourth Amendment issues.

Like the defendants in *Clower* and *Cervantes*, appellant was "precluded from fully litigating the legality" (*Clower, supra,* 16 Cal.App.4th at p. 1743) of police actions in light of the Fourth Amendment, and the trial court "should have heard the evidence" (*Cervantes, supra,* 103 Cal.App.4th at p. 1408) on them. Viewed from this perspective, this case is more about procedural due process than it is about the Fourth Amendment. Because the trial court erroneously precluded appellant from fully litigating the pertinent issues, we will reverse the judgment and remand the matter so that the trial court can conduct a new Penal Code section 1538.5 hearing on appellant's suppression motion filed on December 20, 2007.[5]

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[5] In the event the trial court, following remand, concludes Gasca illegally detained appellant, the trial court can then consider whether any taint of the illegal detention upon a later search of appellant was dissipated by any outstanding warrant(s) and/or Gasca's knowledge thereof. We express no opinion on any of these issues.

Moreover, in light of our analysis, there is no need to consider appellant's argument that he had standing to bring his suppression motion. Respondent concedes the trial court did not deny appellant's suppression motion on the ground appellant lacked standing. We note the court concluded appellant had "contact" with police, police ran him, and there was a valid warrant in the system so police had a right to *arrest* appellant and then *search* him as incident to the arrest. The trial court implicitly ruled Gasca did not initially detain appellant, and the trial court never stated that appellant lacked standing to challenge his initial *detention*, or whether his detention was unduly prolonged, because of the existence of an outstanding warrant.

b. *None of Respondent's Arguments Compel a Contrary Conclusion.*

Respondent's arguments supporting the trial court's ruling are misplaced. Respondent argues Gasca's encounter with appellant was consensual and not a detention. This begs the issue that appellant was precluded from cross-examining Gasca and presenting appellant's testimony on this issue.

Respondent argues appellant's initial detention "was justified by reasonable suspicion because the police received in-person information from codefendant Kroytor that drug deals were taking place in room 26 of the Olive Motel, and appellant walked out of room 26." Respondent cites in support various preliminary hearing testimony of Koenig on this issue. (Appellant, in his opening brief, cited Koenig's preliminary hearing testimony, and respondent, in his opening brief, follows suit.)

However, the suppression motion in this case was not made at the preliminary hearing but, as is typically the case, was made for the first time at a "special hearing"

Similarly, there is no need to consider whether any actions by Gasca which implicated the Fourth Amendment were lawful because appellant had a probation search condition. The prosecutor asked the trial court to take judicial notice that appellant was on formal probation with search and seizure conditions, but the trial court never expressly took such judicial notice. Evidence was presented that appellant was on probation, but no evidence was presented at the hearing on the suppression motion that a search and seizure condition was imposed as a condition of appellant's probation, much less the terms of any such condition. Indeed, no evidence was presented that the offense for which appellant was on probation was an offense of a type for which search and seizure conditions reasonably could have been imposed. (See *People v. Lent* (1975) 15 Cal.3d 481.) At one point the court, during argument on the motion, suggested Gasca testified he knew prior to searching appellant that appellant was "on formal probation and had search and seizure conditions," but the court later acknowleged appellant told Gasca that appellant "was on formal probation" and the court did not then state that appellant also told Gasca that appellant had a search and seizure condition. Respondent concedes "the People never presented evidence that Officer Gasca was aware of a probation search condition or that the police relied on appellant's probationer status to conduct a search." Respondent also concedes "the trial court did not base its ruling on appellant's probationer status." Moreover, as appellant observes, even if Gasca had been aware of any probation search and seizure condition, appellant was precluded from presenting evidence on whether a search or seizure pursuant thereto was arbitrary or for purposes of harassment.

(Pen. Code, § 1538.5, subd. (i)) conducted by the trial court. The record in this case does not reflect that the preliminary hearing transcript was formally received in evidence at the special hearing, either pursuant to a stipulation or an appropriate exception to the hearsay rule. It is settled that, in this circumstance, we do not consider the preliminary hearing transcript. (*People v. Fisher* (1995) 38 Cal.App.4th 338, 341; *People v. Neighbours* (1990) 223 Cal.App.3d 1115, 1120; see *People v. Zabelle* (1996) 50 Cal.App.4th 1282, 1284.)[6]

Respondent argues that Gasca had a "reasonable suspicion justifying the brief detention and request for identification, which led to the discovery of appellant's outstanding warrant." However, assuming appellant was detained, no evidence was presented at the special hearing on the suppression motion that Gasca had a reasonable suspicion that appellant was involved in criminal activity before Gasca learned that appellant had an outstanding arrest warrant. And, of course, appellant was erroneously precluded from presenting evidence on this issue.

Respondent, citing two Ohio cases, *State v. Harding* (2009) 180 Ohio App.3d 497 [905 N.E.2d 1289] (*Harding*), and *State v. Walker-Stokes* (2008) 180 Ohio App.3d 36 [903 N.E.2d 1277], argues that even if appellant was otherwise initially unlawfully detained, that detention did not violate the Fourth Amendment because he had an outstanding arrest warrant which therefore eliminated appellant's reasonable expectation of privacy. However, respondent cites no published California case in accord with the holding of these Ohio appellate court cases.

Moreover, we note *Harding* acknowledged the previous conflicting Ohio appellate authority on this issue and characterized the issue as "not free from difficulty." (*Harding, supra,* 905 N.Ed.2d at p. 1295.) *Harding* observed it is "possible to make compelling

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[6] The parties discuss various cases like *People v. Gallant* (1990) 225 Cal.App.3d 200, on the issue of whether the quantum of information which Gasca had gave rise to a reasonable suspicion justifying Gasca's initial detention of appellant, but the parties cite those cases to evaluate preliminary hearing testimony which, as mentioned, was not before the trial court at the special hearing in this case.

arguments on either side of this issue." (*Id.* at p. 1295.) Further, *Harding*, after noting that "the latest" holding (*ibid.*) of the Ohio appellate court upheld the notion that the outstanding warrant eliminated the defendant's privacy expectation, relied on stare decisis to decide this "close question[] of law." (*Ibid.*)[7] We note respondent cites no authority from the Ohio Supreme Court and, in any event, we are not bound by decisions of sister states (*People v. Ross* (2008) 162 Cal.App.4th 1184, 1190), especially in so unsettled an area of Fourth Amendment jurisprudence as this.

In any event, the fundamental problem with this case is that the trial court erroneously precluded appellant from cross-examining Gasca and precluded appellant from presenting his own testimony. This evidentiary preclusion extended to the issue of whether the outstanding warrant even existed.

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[7] We note respondent concedes our Supreme Court has implied an officer must have knowledge of an outstanding warrant prior to conducting a search incident to arrest. On the other hand, if the outstanding warrant vitiates any privacy interest, arguably no search occurred. Respondent concedes that if "this Court determines that the facts should be developed on the issue of when the officers found out about the outstanding arrest warrant, remand is appropriate for this limited purpose."

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with directions to conduct a new hearing on appellant's Penal Code section 1538.5 suppression motion and for further proceedings consistent with this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.